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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

NO. 71-111

THOMAS LEE CRAWFORD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Thomas Lee Crawford prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on June 22, 1971.

## CITATIONS TO OPINIONS BELOW

The United States District Court for the District of New Mexico did not issue a written opinion. The opinion of the United States Court of Appeals for the Tenth Circuit, printed in Appendix B hereto, infra, has not yet been reported.

## JURISDICTION

The judgment of the Court of Appeals

affirming the judgment of the District Court was entered on June 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

## QUESTION PRESENTED

Where entrapment is the only defense asserted in a criminal prosecution, is it reversible error for a trial court, on timely request, to refuse to voir dire the jury on its bias and/or prejudice, if any, to the defense of entrapment?

## STATUTES INVOLVED

The statutory provision involved is Federal Rule of Criminal Procedure, Rule 24 (a), 18 U.S.C. which provides:

> "EXAMINATION. The court may permit the defendant or his attorney and the

attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper."

## STATEMENT

Thomas Lee Crawford was indicted on five counts of violating 18 U.S.C. §1708 which concerns stolen mail. (R. 5). The case was called for trial and the process of selecting the jury was begun. Crawford's counsel requested that the jury be questioned on their bias and prejudice

toward the defense of entrapment (TR. 21, 36; R. 19-21); the District Court refused the timely request and said:

> "Now, I don't propose to ask some specifics about questions of law.[TR. 21 ].
>
> * * * *
>
> "Yes. The one I refused is where you wanted me to ask them about entrapment. And I might state for the record I never ask jurors specific questions about whether or not they will follow the specific law." [TR. 36 ].

Crawford's only defense to the charges was entrapment. (TR. 154; 355-56). The jury returned a verdict of guilty on all five counts (TR. 387) and Crawford was sentenced to prison for four years.

(R. 23).

The propriety of the District Court's refusal to voir dire the jury on entrapment was raised on appeal to the United States Court of Appeals for the Tenth Circuit; that court affirmed Crawford's conviction. (Appendix B)

## REASONS FOR GRANTING THE WRIT

### THE TRIAL COURT'S REFUSAL TO VOIR DIRE JURORS ON ENTRAPMENT DEPRIVED PETITIONER OF RIGHT TO UNBIASED JURY AND VIOLATED CRIMINAL PROCEDURE RULE 24 (a).

The purpose of voir dire is to assist the parties in selecting an impartial, unbiased and unprejudiced jury. Connors v. United States, 158 U.S. 408, 15 S. Ct. 951,39 LEd. 1033 (1895). Such a jury is

guaranteed to an accused by the Sixth Amendment to the United States Constitution. Voir dire enables counsel effectively to challenge unqualified jurors for cause and intelligently to challenge jurors peremptorily. This Court has often recognized the importance of voir dire:

> "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."

Morford v. United States, 339 U.S. 258, 259, 70 S. Ct. 586, 94 L. Ed. 815 (1950).

Crawford's sole defense in this case was that he was illegally entrapped. (TR. 154; 355-56). It was, therefore,

important for Crawford's counsel to learn of any bias or prejudice the jury might have toward this defense. By relying on entrapment Crawford admitted the crime of which he was accused. It would seem extremely clear that an accused could say nothing more detrimental to his defense than to admit to the crime. Necessarily human nature is such that some people will not vote for acquittal even if the prosecution failed to disprove the existence of entrapment. The District Court, however, refused to inquire into the attitudes of the jurors toward entrapment.

No case was found concerning a refusal

by a trial court to voir dire on the issue of entrapment. There are many cases, however, on related issues which hold it to be reversible error to fail to question jurors on bias in similar situations.

In Aldridge v. United States, 283 U.S. 308, 51 S. Ct. 470, 75 L. Ed. 1054 (1931), this Court reversed a murder conviction of a Negro where the trial court refused to inquire about racial prejudice of the jury. The Court held that the trial court's discretion in voir dire was "subject to the essential demands of fairness." 283 U.S. at 310. A defendant has a right to have the jury questioned on "a disqualifying state of mind." 283 U.S. at 313. The important inquiry

is "the bias of the particular jurors who are to try the accused." 283 U.S. at 314.

> "If in fact, sharing the general sentiment, they were found to be impartial, no harm would be done in permitting the question; but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit." [283 U.S. at 314].

See also United States v. Gore, 435 F.2d 1110 (4th Cir. 1970); King v. United States, 362 F.2d 968 (D.C. Cir. 1966); Frasier v. United States, 267 F.2d 62 (1st Cir. 1959).

There are a number of decisions holding it reversible error to refuse to

inquire whether a juror will believe a police officer more readily than other witnesses solely because of the officer's official capacity. In Brown v. United States, 338 F.2d 543 (D.C. Cir. 1964), then Circuit Judge Warren E. Burger said in reversing the District Court:

> "[T]he issue turns on the degree of impact which the testimony in question would be likely to have had on the jury and what part such testimony played in the case as a whole. [ 338 F.2d at 545 ].

See also Sellers v. United States, 271 F.2d 475 (D.C. Cir. 1960). In the present case the impact of entrapment was most significant--it was Crawford's only

defense.

In United States v. Napoleone, 349 F.2d 350 (3rd Cir. 1965), the District Court was reversed for failing to inquire of the jurors' attitudes toward lying. The alleged offense was impersonating a government officer; the defendant contended he has lied during the event in question but had not impersonated a government officer. The Third Circuit said:

> "Since the crux of the defense was while the defendant had lied concerning the purposes of his investigation he had not presented himself 'as an employee, of the Veterans Administration,' he had the right to have prospective jurors questioned as to whether they

> have such a moral or ethical repugnance toward liars and lying that they could not evaluate his testimony 'objectively and fairly.' [349 F.2d at 350 ].

As in Napoleone Crawford here was prohibited from learning the attitude of the prospective jurors to the "crux of the defense" which was entrapment. See also Lurding v. United States, 179 F.2d 419 (6th Cir. 1950) (error not to question jurors on opinion of operators of "handbooks"); Maguire v. United States, 358 F.2d 442 (10th Cir. 1966) (right to voir dire on bias toward homosexual where defendant is homosexual); Brundage v. United States, 365 F.2d 616 (10th Cir. 1966) ( right to question jurors on attitude toward defense of insanity).

Although it is submitted that Crawford's proposed questions were proper under the above line of authority, the District Court, even though it possessed discretion under Rule 24 (a), never exercised that discretion to rule on the propriety of the questions. The District Court never suggested that the propsed questions were improper; the questions were refused because the trial judge never asked "about questions of law." [TR. 21] . A reading of the questions [Appendix A ] indicates that they were not proposed to inquire about the jurors' understanding or knowledge of the law, but were proposed to elicit from the jurors responses as to whether they be-

lieved entrapment was a valid defense and whether they could consider the facts of entrapment with unbiased minds. Because bias and prejudice would be understandable toward one who admits the crime of which he is accused, and because Crawford's only defense was entrapment, it is respectfully submitted that the District Court erred in refusing to ask the proposed questions on entrapment.

## CONCLUSION

For the foregoing reasons Petitioner respectfully requests that a Writ of Certiorari be granted in this case.

Respectfully Submitted

JAMES E. SPERLING
PETER J. BROULLIRE III

BY James E Sperling
JAMES E. SPERLING

## APPENDIX A

## PROPOSED VOIR DIRE QUESTIONS

* * * *

3. The Defendant in this case may present evidence that he was entrapped or unlawfully induced to commit the crime with which he is charged here. If that evidence demonstrates that the Defendant was, in fact, induced by agents of the government to commit or to be involved in the crime with which he is charged, would any of you be unable to acquit the Defendant by reason of entrapment?

4. Do any of you believe that a person who is induced to commit a crime by an agent of the United States government, and who satisfactorily proves the fact of such inducement by an agent of the

government, should be convicted without regard to such entrapment simply because he did, in fact, commit the crime?

* * * *

12. Do you know of any reason why you cannot follow the law and the instructions of the Court on the issue of entrapment if such defense is raised by the facts in this case?

13. Do you believe any person who may be shown to have actually committed a crime should be allowed to be acquitted where that person demostrates a valid defense of entrapment?

14. Do you believe that it is unjust to acquit a Defendant who has been other-

wise proven to have committed the crime charged simply for the reason that he was entrapped into committing the crime by an agent of the government?

15. Are you aware that there is no lawful entrapment, and if the accused is entrapped, he cannot be punished? Do you have any reason which would make it difficult for you to abide by this doctrine of law in reaching your verdict?

16. Are you aware entrapment occurs when the criminal design, conduct or plan originates in, or is the product of, the minds of government officials and is implanted by them in the mind of an otherwise innocent person? Would you be

able to follow the law in this regard and acquit the Defendant should entrapment be proven to your satisfaction?

Appendix B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Appellant Thomas Lee Crawford was convicted on five counts of unlawful possession of stolen mail in violation of 18 U.S.C. §1708. On appeal he contends that: (a) his proffered questions on entrapment should have been asked by the court of the jurors during voir dire; and (b) that the prosecution did not prove his propensity to commit the crime in order to justify government agents contacting him with an offer to buy stolen credit cards.

We do not find Crawford's first contention persuasive. He cites Brundage

v. United States, 365 F.2d 616 (10th Cir. 1966) and Frasier v. United States, 267 F.2d 62 (1st Cir. 1959). Those cases held that questions relating to racial bias and bias against mental illness were proper on voir dire. By analogy, Crawford argues that voir dire questions regarding bias to the defense of entrapment should have been asked.

The purpose of voir dire is to enable the parties to obtain an impartial jury. Brown v. New Jersey, 175 U.S. 172 (1899); United States v. Williams, 417 F.2d 630 (10th Cir. 1969). The law reposes in the trial judge a wide discretion in the conduct of voir dire. Kreuter v. United States, 376 F.2d 654 (10th Cir. 1967),

cert. denied 390 U.S. 1015 (1968). This discretion is limited only by the essential demands of fairness. Aldridge v. United States, 283 U.S. 308 (1931); Brundage v. Stone, supra; Speak v. United States, 161 F.2d 562 (10th Cir. 1947).

Rule 24 of the Federal Rules of Criminal Procedure provides that the court may itself examine the jury or permit the defendant or his attorney to examine them. It provides that in the event the court examines the jury, the court shall permit the defendant or his attorneys and attorneys for the government to supplement the examination by such further inquiry as it deems proper, or shall submit to the jurors such additional questions by

the parties or the attorneys as it deems proper. This rule vests the trial court with discretion to question jurors, the exercise of which will not be disturbed in the absence of a clear abuse thereof. Speak v. United States, supra; Alford v. United States, 282 U.S. 687 (1931). It is not an abuse of discretion to refuse to permit questioning of jurors on propositions of law. United States v. Gillette, 383 F. 2d 843 (2d Cir. 1967); Grandsinger v. United States, 332 F.2d 80 (10th Cir. 1964); Stone v. United States, 324 F.2d 804 (5th Cir. 1963), cert. denied 376 U.S. 938 (1964).

This court in Grandsinger v. United States, supra, held that refusal on voir

dire examination to explain to jurors the terms "reasonable doubt" and "presumption of innocence" and refusal to ask jurors whether or not they would give the accused benefit of such rules did not constitute an abuse of discretion. There the court informed the jurors of the presumption of innocence and at conclusion of the case instructed as to reasonable doubt.

In the case at bar, the court adequately instructed the jury on the issue of entrapment at the conclusion of the case. Notwithstanding knowledge by the court that Crawford was relying upon the defense of entrapment in light of the proffered questions, the trial

judge could not know until the case was concluded whether the evidence justified instructions on that issue. The trial judge did instruct the jury on the defense of entrapment.

Crawford also contends that the government agent had no grounds to believe that he (Crawford) was involved in the sale of stolen credit cards when he was contacted by the agent and asked to sell him stolen credit cards. He claims that he was entrapped.

In Martinez v. United States, 373 F.2d 810, 812 (10th Cir. 1967) the general rule concerning entrapment was stated:

> "Entrapment occurs when the criminal design or conduct originates in or is the product of the

> government officials and is implanted by them in the mind of an innocent person."

In Newman v. United States, 229 F. 128, 131 (4th Cir. 1924), the court said:

> "It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime." See also Ryles v. United States, 183 F.2d 944 (10th Cir. 1950).

Crawford had once been charged with a crime involving stolen credit cards. A police informant had given Crawford's name to authorities in connection with previous thefts of credit cards from the post office. The undercover agent was, accordingly, justified in approaching Crawford with an offer for purchase of

stolen credit cards. Crawford's ready acceptance evidenced his predisposition to commit such a crime. See Holloway v. United States, 432 F.2d 775 (10th Cir. 1970).

WE AFFIRM.

# In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-111

THOMAS LEE CRAWFORD, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted on five counts of unlawful possession of stolen mail, in violation of 18 U.S.C. 1708. He was sentenced to four years' imprisonment. The court of appeals affirmed (Pet. App. B).

Petitioner's sole claim is that the trial judge committed reversible error in refusing to permit defense counsel to inquire of the prospective jurors on *voir dire* about their attitude regarding the defense of entrapment. The court of appeals, in its opinion on which we rely, fully examined this issue and correctly held that the judge had not abused his discretion, since

it could not be known until the close of the evidence whether an entrapment instruction would be appropriate, and since it is not ordinarily necessary to inquire into a prospective juror's views of a legal issue.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

AUGUST 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971